

SUPREME COURT OF QUEENSLAND

CITATION: *Neuendorf & anor v the Public Trustee of Qld as executor of the estate of J R Dickfos (deceased)* [2013] QSC 156

PARTIES: **JANET CHRISTINE NEUENDORF**
(first applicant)
KERRIE ELIZABETH BRANDON
(second applicant)
v
THE PUBLIC TRUSTEE OF QUEENSLAND as executor of the estate of JEAN ROSE DICKFOS (deceased)
(respondent)

FILE NO: 2785/13

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 June 2013

DELIVERED AT: Brisbane

HEARING DATE: 16 April 2013

JUDGE: Martin J

ORDER: (a) **The parties' costs of the application be assessed on an indemnity basis and paid out of the estate of Jean Rose Dickfos, deceased;**
(b) **The costs of CBM Australia fixed in the sum of \$1,650 be paid out of the estate of the deceased;**
(c) **Pursuant to s 107 of the Powers of Attorney Act 1998, the applicants be compensated out of the estate of the deceased in an amount equal to 84.5 per cent of the value of the estate remaining after payment of the deceased's funeral, testamentary and administration expenses, and the costs payable pursuant to paragraphs (a) and (b) of this order.**

CATCHWORDS: SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – TESTAMENTARY DISPOSITION GENERALLY – DIRECTION AS TO PAYMENT – where the deceased's will contained a bequest of a house to the applicants – where the first applicant was appointed executor of the will – where the house was

subsequently sold by the first applicant as executor – where the applicant was unaware of the contents of the will at the time of selling the house – where the gift of the house had therefore failed – where the applicants make an application for compensation pursuant to s 107 of the *Powers of Attorney Act 1998 (Qld)* – where the court may compensate the applicants out of the principal’s estate in an amount “the court considers appropriate” – where the value of the property has been ascertained – where it was the intention of the testatrix to gift the residual estate to a third beneficiary – where the costs are to come out of the estate – where after the costs are paid out of the estate the amount left for the third beneficiary would be inconsistent with the wishes of the testatrix - whether the amount of compensation awarded to the applicants should be adjusted accordingly

Powers of Attorney Act 1998 (Qld), s 107

Ensor v Frisby [2010] 1 Qd R 146, cited

Moylan v Rickard [2010] QSC 327, considered

Public Trustee of Queensland v Stibbe [2012] QSC 357, cited

Re Stokell (1913) 9 Tas L R 7, cited

COUNSEL: R D Williams for the applicants
J Otto for the Public Trustee of Queensland

SOLICITORS: Smith & Stanton Lawyers for the applicants
Official Solicitor for the Public Trustee of Queensland

- [1] The applicants seek orders under s 107 of the *Powers of Attorney Act 1998 (Qld)* (“the Act”) that each of them be compensated out of the estate of Jean Rose Dickfos (“Miss Dickfos”).
- [2] Miss Dickfos and Elaine Ada Shaw (“Miss Shaw”) had, by 1998, been close friends for decades. In that year they purchased a property in Bald Hills (“the Bald Hills property”) as joint tenants. At about the same time, each of them executed an enduring power of attorney (“the EPAs”) appointing the first applicant (“Ms Neuendorf”) as their respective attorney for personal, health and financial matters.
- [3] Ms Neuendorf is a cousin of the second applicant (“Ms Brandon”). Ms Brandon was a niece of Miss Shaw. Both Ms Neuendorf and Ms Brandon regarded and treated Miss Dickfos as a member of their respective families. Ms Neuendorf’s children had a close relationship with both Miss Dickfos and Miss Shaw and treated them as if they were grandparents.
- [4] Ms Neuendorf provided assistance to both Miss Dickfos and Miss Shaw with their housework at the Bald Hills property and assisted them with shopping.
- [5] As the years went by the level of assistance provided by Ms Neuendorf increased as Miss Shaw became vision impaired and then lost her sight. Ms Neuendorf did their banking, collected their medications and cooked for them.

- [6] In about November 2009 Miss Dickfos was admitted to hospital as a result of having broken one of her hips. During her stay in hospital her mental capacity deteriorated to such an extent that it became apparent that she could not return to the Bald Hills property and arrangements were made for her to enter a nursing home at Deception Bay.
- [7] With Miss Dickfos no longer living at the Bald Hills property Miss Shaw, due to her impaired sight, could no longer live there alone. At Miss Shaw's request, Ms Neuendorf arranged for her to go to the same nursing home as Miss Dickfos and to occupy an adjoining room. Both Miss Dickfos and Miss Shaw entered the nursing home in January 2010. For reasons which are unimportant, Miss Shaw was classified as a "low care" resident and a bond was required to be paid for her in the sum of \$245,000. No such bond was required for Miss Dickfos because she was classified as a "high care" resident.
- [8] Miss Shaw did not have enough money to pay all of that bond. Approximately \$113,500 was paid soon after she entered the nursing home but because the nursing home charged interest on the unpaid amount steps had to be taken quickly to pay the balance of the bond. The only way this could be done was through the sale of the Bald Hills property.
- [9] Ms Neuendorf set about that task. The property was sold in May 2010 for \$332,000 and the balance of the sale proceeds was approximately \$308,600. Half that sum was deposited in to Miss Dickfos' bank account.
- [10] In September 2004 both Miss Dickfos and Miss Shaw made wills. Each woman gave the whole of her estate to the other absolutely, provided that the other survived her for 30 days. In Miss Dickfos' will there was a substitutional provision should distribution of the estate to Miss Shaw not take place. The will provided:
- "8. Specific Bequest**
I GIVE to my friend JANET NEUENDORF ... and my friend KERRIE BRANDON ... my house and land at ... BALD HILLS ... and all my household furniture and household effects (other than motor vehicles) therein at my death which shall be held by them or the survivor of them equally.
- 9. Further Gift of Residue**
I GIVE –
- My residuary estate to the CHRISTIAN BLIND MISSION INTERNATIONAL presently of 1245 Burke Road Kew in the State of Victoria for the general purposes thereof."
- [11] Miss Shaw's will contained a similar substitutional provision and further gifts to other people.
- [12] In November 2010, after the Bald Hills property had been sold, Miss Shaw made a new will. The will appointed Ms Neuendorf as her executor and provided for the following:
- (a) \$10,000 to be paid to Miss Dickfos, by way of repayment of a debt;
 - (b) 50 per cent of Miss Shaw's estate to pass to Ms Neuendorf;

- (c) 40 per cent of Miss Shaw's estate to pass to Ms Brandon; and
- (d) The balance of 10 per cent to pass to other relatives and a charity.

- [13] Ms Neuendorf was not aware of the contents of Miss Dickfos' will until after her death when she received a copy of it from the respondent.
- [14] On 15 June 2011 Miss Shaw died. Upon the distribution of her estate, Ms Neuendorf received approximately \$137,600 and Ms Brandon received approximately \$107,700.
- [15] Miss Dickfos died on 24 August 2012.
- [16] On 28 November 2012 an order was made authorising the respondent to administer Miss Dickfos' estate in accordance with the will.
- [17] In January 2013 the respondent wrote to Ms Neuendorf advising her that as the Bald Hills property had been sold, the gift in the will to her had failed and that she would not receive anything under the estate. The respondent suggested that Ms Neuendorf consider whether or not to make an application under s 107 of the Act for compensation. A similar letter was sent to Ms Brandon.
- [18] The respondent does not contend against the making of an order for compensation in favour of the applicants. The issue between the parties concerns the amount of such compensation and how it should be calculated.

The Powers of Attorney Act

- [19] Section 107 of the Act provides:

“107 Power to apply to court for compensation for loss of benefit in estate

- (1) This section applies if a person's benefit in a principal's estate under the principal's will, on intestacy, or by another disposition taking effect on the principal's death, is lost because of a sale or other dealing with the principal's property by an attorney of the principal.
- (1A) This section applies even if the person whose benefit is lost is the attorney by whose dealing the benefit is lost.
- (2) The person, or the person's personal representative, may apply to the Supreme Court for compensation out of the principal's estate.
- (3) The court may order that the person, or the person's estate, be compensated out of the principal's estate as the court considers appropriate but the compensation must not exceed the value of the lost benefit.
- (4) The *Succession Act 1981*, sections 41(2) to (8), (10) and (11) and 44 apply to an application and an order made on it as if the application was an application under part 4 of that Act by a person entitled to make an application.
- (5) In this section—
 - attorney* means an attorney under—
 - (a) a general power of attorney made under this Act; or

- (b) an enduring document; or
- (c) a power of attorney made otherwise than under this Act, whether before or after its commencement.”

- [20] I was informed by both counsel that s 107 is unique to Queensland. No other State or Territory legislation contains a similar provision. The section has been referred to by McMurdo J in *Ensor v Frisby*.¹ In that case the question of the calculation of compensation did not arise. In *Moylan v Rickard*,² Peter Lyons J approached the measure of compensation under s 107 by considering the change in value of the property which had been sold by the Attorney between the date of sale and the date of death of the Attorney’s principal. In that case evidence was adduced of the movement of median house prices in the relevant area over time. With no better evidence being available, his Honour was prepared to accept that as a tool able to be used to determine value.³
- [21] The discretionary power given to the court under s 107(3) is to compensate, out of the principal’s estate, by an amount “the court considers appropriate”. No further guidance is given.
- [22] The matters which might be the subject of consideration when determining an appropriate level of compensation will change from case to case. Some matters, though, will always be of general interest. They include:
- (a) The size of the estate;
 - (b) The identity of the other beneficiaries and the nature of the gifts to them;
 - (c) The proportions that the gifts to the applicants bear to the whole estate. In cases involving real property some form of valuation will be necessary;
 - (d) The actions of the Attorney;
 - (e) Whether there was any default by the Attorney;
 - (f) Whether any action could or might have been taken under s 106 of the Act;
 - (g) What was done with the funds after the sale took place;
 - (h) The costs which have been incurred and which will be paid out of the estate; and
 - (i) Had the property not been sold, what would the position have been?
- [23] The respondent submits that it is relevant to take into account that the selling of the property by Ms Neuendorf was an action taken for both Miss Dickfos and Miss Shaw as they owned it as joint tenants. The sale, it is said, was therefore not solely attributable to the acts of Ms Neuendorf in her capacity as Miss Dickfos’ attorney. That is so, but in the circumstances of this case I do not doubt that, given the history of Miss Dickfos and Miss Shaw, each would have supported the other in the action taken by Ms Neuendorf. Indeed, the sale was of benefit to both Miss Shaw and Miss Dickfos.

¹ [2010] 1 Qd R 146

² [2010] QSC 327

³ A similar approach was taken by Ann Lyons J in *Public Trustee of Queensland v Stibbe* [2012] QSC 357 where her Honour considered s 60 of the *Guardianship and Administration Act 2000* which is similar in some of its terms to s 107.

- [24] It is not contested that Ms Neuendorf was unaware of the contents of Miss Dickfos' will until after her death. There is no suggestion of any improper behaviour on the part of Ms Neuendorf.
- [25] Had the property not needed to be sold then, as Miss Shaw predeceased Miss Dickfos, that entire asset would have passed to the applicants.
- [26] In the absence of s 107 the gift to both applicants would have failed in accordance with the doctrine of ademption. Neither would have been able to trace the proceeds of the sale of the property.⁴
- [27] In these circumstances there has been no default by the attorney. The attorney's actions were for the direct benefit of Miss Shaw and, at least, an indirect benefit to Miss Dickfos. As a result, the gift to the attorney has failed. In these circumstances it is appropriate, then, to contrast the position which would have obtained had the property not been sold with the position which does exist.

Value of the property

- [28] So far as the value of the lost benefit is concerned, there was evidence that a market appraisal of the Bald Hills property in March 2013 estimated its value as between \$300,000 and \$310,000. As I have noted, the property sold for \$320,000 with the balance of the sale proceeds received after settlement being about \$308,000. I will use the figure of \$310,000 as the value of the property had it not been sold.
- [29] Each applicant has already received the benefit of Miss Shaw's one-half share of the net proceeds of sale through the provision made for them in her will.
- [30] The current value of Miss Dickfos' estate is \$183,378. Half of the value of the property which was sold amounts to \$155,000. That figure represents the maximum which could have been received had the property not been sold.

Other beneficiaries

- [31] The beneficiary of the residual estate was Christian Blind Mission International ("CBM"). Under the notional retention of the Bald Hills property CBM would have received the difference between \$183,378 and \$155,000, namely, \$28,378.

Appropriate compensation

- [32] The action of Ms Neuendorf was consistent with her duty as an attorney and was for the benefit of the donor of the power. It resulted in the failure of the gift in the will of Miss Dickfos to her and Ms Brandon. This is a case where actions properly taken have resulted in a loss to the attorney and in which s 107 should respond in the attorney's favour with an award of appropriate compensation.
- [33] What is appropriate should be measured not only against the interests and conduct of the applicants, but also against the interest and conduct of CBM. It is as innocent of wrong doing as the applicants. But, as was pointed out by the respondent, if the costs of the application are, in the usual way, ordered to be paid out of the estate, CBM will lose a substantial amount.

⁴ *Re Stokell* (1913) 9 Tas L R 7

- [34] The quantum of costs for the applicants, the respondent and CBM is \$26,050.⁵ If that was paid out of the estate then CBM would only receive \$2,328.
- [35] It would not seem to be consistent with the wishes of the testatrix if CBM's gift was reduced to that extent. An appropriate way of recognising the intentions in the will, the removal of the property from the estate through its sale, and the requirement to expend costs on this application, is to spread the burden of the costs across the beneficiaries. The method I have adopted is as follows:
- (a) Determine the proportions of the estate to be distributed by finding the amount which the notional share of the property represents. The most which could be available to the applicants is \$155,000 which represents 84.5% of the total estate of \$183,378. Thus, CBM's proportion is 15.5%.
 - (b) Deduct the total amount of costs from the value of the estate: $\$183,378 - \$26,050 = \$157,328$.
 - (c) Apply the proportions found above to the figure of \$157,328:
 - (i) 84.5% of \$157,328 = \$132,942
 - (ii) 15.5% of \$157,328 = \$24,386

Order

- [36] As there will be other costs necessarily incurred in the administration of the estate the figures set out above may change. To allow for that, the orders are:
- (a) The parties' costs of the application be assessed on an indemnity basis and paid out of the estate of Jean Rose Dickfos, deceased;
 - (b) The costs of CBM Australia fixed in the sum of \$1,650 be paid out of the estate of the deceased;
 - (c) Pursuant to s 107 of the *Powers of Attorney Act* 1998, the applicants be compensated out of the estate of the deceased in an amount equal to 84.5 per cent of the value of the estate remaining after payment of the deceased's funeral, testamentary and administration expenses, and the costs payable pursuant to paragraphs (a) and (b) of this order.

⁵ Third Bassett Affidavit, para 2 – Applicants' costs: \$12,300. Second Forster Affidavit, para 5 – Respondent's costs: \$12,100 and para 7 – CBM's costs: \$1,650